

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NICHOLAS P. TIDES,

Plaintiff,

v.

THE BOEING COMPANY,

Defendant.

and

MATTHEW NEUMANN,

Plaintiff,

v.

THE BOEING COMPANY

Defendant.

No. 2:08-cv-1601 JCC

No. 2:08-cv-1736 JCC

**BOEING'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

NOTED ON MOTION CALENDAR:

December 18, 2009.

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Plaintiffs spend a substantial portion of their brief slinging mud at Boeing. What they fail to do is demonstrate that they can meet the *prima facie* elements of a claim for whistleblower retaliation under the Sarbanes Oxley Act.

Boeing asks that the Court strike the improper evidence presented and that the Court grant its motion for summary judgment and dismiss this matter in its entirety.

II. MOTION TO STRIKE

Plaintiffs submit several improperly authenticated and hearsay-laden documents with their Response. For the reasons explained herein, Boeing moves to strike Exhibits 1, 3, 10, 11, 12, 17 (and all references to the decision of the Employment Security Department (“ESD”)), and 24, along with all references to those documents.

Each of the listed exhibits is improperly authenticated. The only authentication for these exhibits is the declaration of Plaintiffs’ attorney that they were obtained from “a reliable sources [sic]” and that they “are what they purport to be.” This is insufficient to authenticate these exhibits. In ruling on a summary judgment motion, the Court may only consider admissible evidence. *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) (excluding deposition extracts because inadmissible due to inadequate authentication and hearsay); *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1989) (excluding unauthenticated documents). Authentication is a “condition precedent to admissibility,” which is satisfied by evidence sufficient to support the claim. *Orr*, 285 F.3d at 773. A document may be authenticated by a witness with knowledge of the document or by any other manner permitted by Fed. R. Evid. 901(b) or 902.

In a summary judgment motion, documents authenticated through personal knowledge must be “attached to an affidavit that meets the requirements of [Fed.R.Civ.P.] 56(e) and the

1 affiant must be a person through whom the exhibits could be admitted into evidence.” *Orr*,
2 285 F.3d at 774-75. Exhibits 1, 3, 10, 11, 12, and 17 are all documents authenticated solely
3 by Mr. Tollefsen. This is insufficient, as Mr. Tollefsen neither prepared nor witnessed the
4 preparation of these documents and has no special knowledge of their creation. For that
5 reason, they are inadmissible. *Orr*, 285 F.3d at 777-78.

6 Furthermore, each of the listed exhibits contains hearsay for which no exception
7 applies. All are out of court statements offered in evidence to prove the truth of the matter
8 asserted. Fed. R. Evid. 801. As such, all these exhibits should be stricken. *Orr*, 285 F.3d at
9 778-79; *Wallace v. Wendy’s Int’l, Inc.*, 2006 U.S. Dist. LEXIS 85758, 4-5 (W.D. Wash.
10 2006).

11
12 Exhibit 24 purports to be transcript excerpts of testimony from the trial of Karl Reid.
13 The transcripts do not identify the name of the witnesses, the trial, or the judge, and are not
14 certified copies of the reporter’s transcript. Accordingly they are not authenticated. Fed. R.
15 Civ. P. 80(c); *Orr*, 285 F.3d at 776. Mr. Tollefsen cannot authenticate this exhibit by stating
16 in his affidavit that it is a “true and correct copy,” as his statement lacks foundation, even if he
17 were present when the witnesses testified at the Reid trial. *Id.* at 776-77.

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19 Finally, Exhibit 17, and any reference to the decision of the ESD should be struck
20 pursuant to RCW 50.32.097. That statute states that any finding made by the commissioner
21 of the ESD is not admissible as evidence in a separate action outside of Title 50 RCW and has
22 no collateral estoppel effect. *Wallace v. Wendy’s Int’l, Inc.*, 2006 U.S. Dist. Lexis 85758
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1 (W.D. Wash. 2006); *Sweeney v. Manorcare Health Servs.*, 2006 U.S. Dist. Lexis 26991

2 (W.D. Wash. 2006). Plaintiff's argument to the contrary is frivolous and without basis.

3 For these reasons, Boeing requests the Court strike those exhibits and all references to
4 them.

5 **III. LAW AND ARGUMENT**

6 Plaintiffs have failed to come forward with admissible evidence that is sufficient to
7 support their claims for whistleblower retaliation.
8

9 **A. Termination is a Discrete Act, Not Part of a Hostile Work Environment.**

10 Plaintiffs admit that their claim would be untimely "if the actions were discrete and not
11 part of a continuing hostile work environment." Plaintiffs are correct on this point, and as a
12 matter of law it is clear that a termination is a discrete act, not an act related to a hostile work
13 environment. Thus, Plaintiffs' claims, other than the claims for their termination, are untimely.
14

15
16 "[C]laims based on a hostile environment are only timely where at least one act
17 occurred during the limitations period." *Cherosky v. Henderson*, 330 F.3d 1243, 1246 (9th
18 Cir. 2003); *see also Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 893 (9th Cir. 2005) ("If the
19 flames of an allegedly hostile environment are to rise to the level of an actionable claim, they
20 must do so based on the fuel of timely **non-discrete** acts.") (emphasis added).
21

22 Although acts contributing to a hostile work environment are treated as one unlawful
23 employment practice for purposes of the statute of limitations, discrete acts, such as
24

1 termination, failure to promote, denial of transfer, or refusal to hire, cannot qualify as related
2 acts. *Richards v. City of Seattle*, 2008 U.S. Dist. Lexis 49406 (W.D. Wash. 2008). To
3 constitute one actionable unlawful employment practice, the various acts “must have some
4 relationship to each other.” *Davis v. City of Seattle*, 2008 U.S. Dist. Lexis 4429 (W.D. Wash.
5 2008) (citing *Antonius v. King County*, 103 P.3d 729 (2004)). Discrete acts, such as
6 termination, failure to promote, denial of transfer, or refusal to hire, cannot qualify as related
7 acts. *Id.* at 264 (citing *Morgan*, 536 U.S. at 108-13); *Davis v. City of Seattle*, 2008 U.S. Dist.
8 Lexis 4429 (W.D. Wash. 2008).

10 In *Porter v. Cal. Dep’t of Corr.*, 419 F.3d 885 (9th Cir. 2005), the court was faced
11 with the identical circumstances presented here. Plaintiff alleged that timely discrete acts
12 made timely an otherwise untimely hostile work environment claim. The court rejected the
13 argument, holding that while the timely discrete acts could be pursued, the hostile work
14 environment claim was time barred.
15

16 Consequently, we refuse to mix recent discrete acts like tinder with the planks of
17 ancient sexual advances and then, regardless of whatever it was that set the spark
18 in the furnace, call the fire that ignites therefrom a hostile environment. If the
19 flames of an allegedly hostile environment are to rise to the level of an actionable
20 claim, they must do so based on the fuel of timely non-discrete acts.”

21 *Id.* at 893; *see also, Cherosky v. Henderson*, 330 F.3d 1243, 1246 (9th Cir.2003) (“claims
22 based on a hostile environment are only timely where at least one act occurred during the
23 limitations period”); *Mems v. City of St. Paul, Dep’t of Fire & Safety Servs.*, 327 F.3d 771,
24 785 (8th Cir. 2003 (“Discrete acts that fall within the statutory time period do not make timely

1 acts that fall outside the time period.”); *Cooper v. Wyeth Ayerst Lederle*, 106 F. Supp. 2d 479,
2 489 (S.D.N.Y. 2000) (“[D]iscrete discriminatory acts--or discrete instances of discriminatory
3 inaction--not related to a discriminatory policy are not a continuing violation.”) (*citing*
4 *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993)); *Ruffino v. State St. Bank & Trust*
5 *Co.*, 908 F. Supp. 1019, 1040 (D. Mass. 1995) (“[T]he simple factual and legal intersection
6 between an underlying claim of discrimination and retaliation is insufficient to revive an
7 otherwise stale claim.”).

9 For this reason, Plaintiffs’ claims of adverse employment action, other than their
10 termination, are not actionable and should be dismissed.

11 **B. Plaintiffs Were Not Subjected To A Hostile Work Environment.**

12 Even if Plaintiffs’ other alleged acts of adverse employment actions were timely, they
13 do not rise to the level of a hostile work environment and therefore cannot support a claim for
14 whistleblower retaliation.
15

16 A *prima facie* claim for hostile work environment must raise triable issues of fact as to
17 whether (1) the plaintiffs were subjected to verbal or physical conduct because of their
18 protected status (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe
19 or pervasive to alter the conditions of their employment and create an abusive work
20 environment. *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002). Moreover, the
21 work environment must be perceived as abusive from both a subjective and objective point of
22 view. *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000). In examining whether
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1 the workplace was objectively abusive, courts must consider the perspective of a reasonable
2 person with the plaintiffs' same fundamental characteristics. *See Fuller v. City of Oakland*, 47
3 F.3d 1522, 1527 (9th Cir. 1995). Finally, in considering whether the discriminatory conduct
4 was sufficiently severe or pervasive, courts must look to "all the circumstances, including the
5 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or
6 humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an
7 employee's work performance.'" *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1110 (9th Cir.
8 2000 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)).

10 Here, Plaintiffs allegations, even if taken as true, do not amount to the "severe and
11 pervasive" conduct required to support a claim. Plaintiffs complain vaguely of "hostility" and
12 "pressure." Mr. Tides complains that he was yelled at on two separate occasions by different
13 individuals. They complain that their supervisor told them they would not receive ratings
14 above "meets expectations." Mr. Tides complains that his supervisor said she wouldn't have
15 hired him. They complain that Boeing managers said that Sox was "going away," and that
16 they were required to submit their work for review by their managers, some of whom worked
17 as contractors from PwC.

19 Contrast those claims to those in cases where courts have found acts sufficient to
20 support a claim of "hostile work environment." *E.g., Nichols v. Azteca Rest. Enters.*, 256
21 F.3d 864, 872 (9th Cir. 2001) (male plaintiff endured an "unrelenting barrage of verbal abuse"
22 including employees habitually calling him sexually derogatory names, referring to him with
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1 the female gender, and taunting him for behaving like a woman.); *Craig v. M & O Agencies,*
2 *Inc.*, 496 F.3d 1047, 1056-57 (9th Cir. 2007) (female employee established a prima facie case
3 for hostile work environment where her boss repeatedly solicited her to perform sexual favors
4 over several months and engaged in five significant incidents of harassing conduct, including
5 one in which he followed her into a women's restroom and kissed her).

6
7 There is no evidence that the conduct complained of here was because of Plaintiffs'
8 alleged whistleblowing activities. Further, the type of conduct complained of here does not
9 reach the level of severe and pervasive conduct required to support a claim for a hostile work
10 environment. Nor is there sufficient evidence to demonstrate that the conduct complained of
11 unreasonably interfered with Plaintiffs' work performance. For these reasons, these claims
12 should be dismissed.

13
14 **C. Plaintiffs Did Not Engage In Protected Activity**

15 Plaintiffs claim four different categories of protected activity. None of these categories
16 "specifically and definitively" relate to one of the categories of activity protected by the Act.¹
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22 ¹ Should the need arise, Defendant will vigorously contest the factual allegations made by Plaintiffs. However,
23 for purposes of summary judgment, the Court must accept as true Plaintiffs' allegations.
24

1 **1. Plaintiffs' Complaints about Compliance with the IIA Standards**
 2 **Were Not Protected Activity.²**

3 Plaintiffs contend they complained about three different categories of violations of the
 4 Standards of the Institute for Internal Auditors. Response pp. 15-20. However, IIA
 5 Standards are not federal law, nor are they rules or regulations of the SEC.

6 Plaintiffs contend that the NYSE Corporate Governance Rules require companies to
 7 have an internal audit function, and seem to argue (without evidence) that Boeing adopted the
 8 IIA Standards to comply with the NYSE rules. Plaintiffs note that the NYSE Rules were
 9 approved by the SEC, and apparently equate that with a rule of the SEC. The NYSE Rules
 10 are not federal law, nor are they SEC rules or regulations. *See*, 15 U.S.C. § 78f (allowing for
 11 self-regulated entities); *Cf.*, 17 C.F.R. § 240.19b-4; 17 C.F.R. 200.30-3(12) (regulations
 12 pertaining to self-regulated entities). At any rate, nothing in the NYSE rules, or the SEC rules
 13 or regulations give the IIA Standards the force of law or in any way mandate compliance with
 14 those rules.
 15

16 Similarly, 15 U.S.C. § 78m(b)(2)(B), cited by Plaintiffs, does not mandate the use of
 17 IIA Standards, nor gives them the force of law. That law simply requires certain companies:
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19 [D]evise and maintain a system of internal accounting controls sufficient to provide
 20 reasonable assurances that—

21 (i) transactions are executed in accordance with management's general or specific
 22 authorization;

23 (ii) transactions are recorded as necessary
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² Boeing was at all times fully compliant with IIA Standards, however, for purposes of summary judgment, recognizes that the Court must accept Plaintiffs' claims as they are presented.

1 (I) to permit preparation of financial statements in conformity with generally
accepted accounting principles or any other criteria applicable to such statements, and

2 (II) to maintain accountability for assets;

3 (iii) access to assets is permitted only in accordance with management's general or
specific authorization; and

4 (iv) the recorded accountability for assets is compared with the existing assets at
reasonable intervals and appropriate action is taken with respect to any differences;

5 15 U.S.C. § 78m(b)(2)(B). Nothing in this statute makes the IIA Standards into a rule or
6 regulation of the SEC or a federal law protecting shareholders.

7 Likewise, nothing in § 404 of Sox requires compliance with the IIA Standards.

8 Plaintiffs cites to 17 C.F.R. §240, which requires companies to follow a suitable control
9 framework. Plaintiffs admit Boeing adopted the COSO Framework, Response p.15-16,
10 which, while not mandated, meets this requirement. 68 Fed. Reg. 36636, June 18, 2003.

11 Nowhere, however, do Plaintiffs point out any rule or regulation that requires compliance with
12 the IIA Standards. Instead, they claim, without evidence, that Boeing adopted the IIA
13 standard in order to comply with the COSO Framework, which was adopted to comply with
14 the Act. This does not make the IIA Standards a rule or regulation of the SEC, nor does it
15 make them federal law. Instead, Plaintiffs are complaining about Boeing's alleged violation of
16 their own internal standards. This is not protected activity. A "disagreement with
17 management" about internal procedures is not "protected activity of alleging intentional deceit
18 of shareholders or violations of SEC rules or regulations." *Day v. Staples*, 555 F.3d 42, 51
19 (1st Cir. 2009).

1 **2. Plaintiffs' Complaints about Falsifying Records Were Not**
 2 **Protected Activity.**

3 Plaintiffs next claim that their complaints regarding the use of the Risk Navigator
 4 software program amounted to protected activity. Mr. Tides claims that he complained that
 5 Risk Navigator potentially allowed "unqualified people to improperly change ratings of
 6 information systems internal controls from fail to pass." Tides Decl. ¶ 44. Each claims to have
 7 "noted" the "lack of integrity of the data in Risk Navigator." Id. ¶ 27; Neumann Decl. ¶ 29.
 8 These vague allegations, even if credited, do not fulfill the requirements for "protected
 9 activity" under the law.

10 Although the allegations of illegal activity need not be ultimately substantiated, the
 11 complaint must be "grounded in conditions constituting reasonably perceived violations."
 12 *Robinson v. Morgan Stanly*, 2005 SOX 44 (ALJ March 26, 2007) (*quoting Minard v. Nerco*
 13 *Delamar Co.*, 92 SWD 1 (Jan. 25, 1995), slip op. at 8). A mere possibility that a challenged
 14 practice could adversely affect the financial condition of a corporation, and that the effect on
 15 the financial condition could in turn be intentionally withheld from investors, is not enough.
 16 *Stojicevic v. Arizona-American Water*, ARB No. 05-081, ALJ No. 2004-SOX-73 (ARB Oct.
 17 30, 2007). Moreover, the statute requires Reid to have held a reasonable belief about an
 18 **existing** violation, inasmuch as the violation requirement is stated in the present tense: a
 19 plaintiff's complaint must be "regarding any **conduct which [he] reasonably believes**
 20 **constitutes a violation** of [the relevant laws]." 18 U.S.C. § 1514A(a)(1) (emphasis added).
 21 *Accord, Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 341 (4th Cir. 2006) ("the
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1 employee must have an objectively reasonable belief that a violation is actually occurring based
2 on circumstances that the employee observes and reasonably believes.”) (construing the
3 retaliation provision in Title VII, 42 U.S.C. § 2000e-3(a)). The *Jordan* court rejected the
4 claim that a reasonable belief that a violation has occurred or is in progress can include a belief
5 that a violation is about to happen upon some future contingency. *See id.* at 340-41. Likewise,
6 complaints about purely internal practices that are not financial in nature and are not reported
7 to shareholders do not meet the materiality requirement for an objectively reasonable belief in
8 shareholder fraud. *Day v. Staples*, 555 F.3d 42, 57-58 (1st Cir. 2009).

10 Here, Plaintiffs’ complaints about Risk Navigator allege at best the possibility that a
11 control that should fail testing would be entered as passing, that someone would take
12 advantage of that hypothetical weak control to manipulate financial data, that the hypothetical
13 manipulation of financial data would not be caught by other controls, that the hypothetical
14 undetected manipulation of financial data would make its way onto the financial statements,
15 that this hypothetical misconduct would result in a material misstatement on the financial
16 statements, and that this hypothetical material misstatement would not be found by the external
17 auditors, Deloitte & Touche. Even then, as Matt Bailey, Boeing’s Senior Manager for
18 Financial Compliance testified, it is “highly unlikely” that the failure of a general computing
19 control could lead to a material misstatement. Exhibit A. Such an attenuated chain of remote
20 possibilities cannot support a claim for protected activity. *Stojicevic v. Arizona-American*
21 *Water*, ARB No. 05-081, ALJ No. 2004-SOX-73 (ARB Oct. 30, 2007).

1 **3. Plaintiffs' Complaints about "Document Tampering" Were Not**
 2 **Protected Activity.**

3 Plaintiffs rely on Auditing Standard 2, promulgated by the PAOCB, for their claim that
 4 complaints about changes to control documentation violated an SEC rule. Plaintiffs' claims
 5 are misplaced. Auditing Standard 2 was superseded by Auditing Standard 5 in 2007, and
 6 neither standard applies to a company's *internal* auditors. Those standards apply exclusively
 7 to the *external* auditors. Because these standards have no applicability to the actions of
 8 internal auditors, complaints that the internal auditors were not complying with those
 9 standards cannot reasonably state a potential violation of one of the categories of laws listed in
 10 § 1514A.

11 **4. Plaintiffs' Complaints about Potentially Misleading External**
 12 **Auditors Were Not Protected Activity.**

13 Plaintiffs next claim that their activities alleged violations of § 303 of Sox and the
 14 related implementing rules. Again, their claims are misplaced. Plaintiffs claim that this section
 15 prohibits the company from taking action that would cause an "auditor" to violate "other
 16 professional standards." Response p. 24-25. They claim that the IIA Standards qualify as
 17 "other professional standards" and their complaints about the IIA Standards and alleged
 18 violations are therefore protected.

19 However, as used in § 303, "auditor" refers to the *external* auditor, not the *internal*
 20 auditors. See § A101(a)(2) (defining "audit" as "an examination of the financial statements of
 21 any issuer by an *independent* public accounting firm" (emphasis added)). Nowhere do
 22 any issuer by an *independent* public accounting firm" (emphasis added)). Nowhere do
 23 any issuer by an *independent* public accounting firm" (emphasis added)). Nowhere do
 24 any issuer by an *independent* public accounting firm" (emphasis added)). Nowhere do

1 Plaintiffs claim that they complained about interference with the external auditors, or the
2 ability for those auditors to work within the IIA Standards. Nor is it possible for any
3 information on Risk Navigator to mislead the external auditors, as they performed an
4 independent audit in 2006 without relying on any of Boeing's internal work. Exhibit B.

5 **D. Plaintiffs Present No Evidence Demonstrating Any Alleged Protected**
6 **Activity Was A Contributing Factor In Their Terminations.**

7 Plaintiffs contend that their unauthorized release of information to the media was
8 protected activity, and that therefore their terminations were illegal. This claim fails as a
9 matter of law, as there is no protection for release of information to the media.

10 The sole claim in this case is that Plaintiffs were retaliated against for engaging in
11 activity protected by the Sarbanes Oxley Act. See, Complaint. Plaintiffs cite an incredible
12 number of other whistleblowing statutes and other inapposite law, but never refute the simple
13 fact that § 806 protects only reports made to "(A) a Federal regulatory or law enforcement
14 agency; (B) any Member of Congress or any committee of Congress; or (C) a person with
15 supervisory authority over the employee (or such other person working for the employer who
16 has the authority to investigate, discover, or terminate misconduct)." 18 U.S.C. 1514A. By
17 its plain and unmistakable language, the statute does not cover reports to the media.
18

19 Plaintiffs spend nearly six pages arguing about the expansive scope of six other
20 whistleblowing acts. However, the only relevant point is found in footnote 126. After stating
21 that these other whistleblowing statutes are ambiguous as to whom a report must be directed,
22 Plaintiffs admit that "Sox is an exception and has arguably the most specific list of recipients
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1 of the whistleblower's report." Response p.29 n.126. "The preeminent canon of [federal]
 2 statutory interpretation requires [a court] to 'presume that [the] legislature says in a statute
 3 what it means and means in a statute what it says there.'" *BedRoc Ltd. v. United States*, 541
 4 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).
 5 Thus, in the absence of a clear indication to the contrary, the Court should presume that
 6 Congress intended to exclude the media from the list of individuals to whom complaints are
 7 protected activity.³

9 Plaintiff next raises the First Amendment. Of course the First Amendment has no
 10 applicability to private actors. See *Brentwood Academy v. Tenn. Secondary Sch. Athletic*
 11 *Ass'n.*, 531 U.S. 288, 295, (2000); *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743,
 12 746-47 (9th Cir. 2003). Even if it did, there is no claim in this case for a violation of First
 13 Amendment rights. In conjunction with their First Amendment claim, Plaintiffs note that
 14 Washington has created an exception to the employment-at-will doctrine for "clearly
 15 mandated public policy." Even if the unauthorized release of information to the media was
 16 somehow "clearly mandated public policy," (despite plain statutory language to the contrary),
 17 Plaintiff's complaint does not make a claim for wrongful termination under Washington law.

19 Finally, Plaintiffs allege that their releases to the media were protected by Section 7 of
 20

21
 22 ³ Plaintiffs' Exhibit 1 is not to the contrary. First, the Court should disregard it in its entirety. See Motion to
 23 Strike. Second, the letter is not the official position of OSHA, and even if it were, an Agency's interpretation
 24 may be disregarded where it is plainly erroneous or inconsistent with the law or regulation. *Thomas Jefferson*

1 the National Labor Relations Act. Even if this were true, there is no claim here for violation
 2 of the NLRA (nor have Plaintiffs exhausted their administrative remedies for any such claims).
 3 The NLRA is not one of the laws listed in 18 U.S.C. § 1514A. Plaintiffs admit that Boeing
 4 Procedure 2227 governs the proper means of information protection, Response p. 34, and
 5 offer no evidence that their disclosures complied with those requirements. At best, this
 6 allegation demonstrates a dispute between Boeing and Plaintiffs about the propriety of their
 7 termination under Boeing's policies, which is not actionable under Sox or other law.
 8

9 Because Plaintiffs have failed to present any evidence that their involvement in any
 10 alleged protected activity was a contributing factor in their terminations, they have failed to
 11 make a *prima facie* case and the Court should grant Boeing's motion for summary judgment.
 12

13 **E. Plaintiffs Present No Evidence To Contradict Defendant's Evidence That**
 14 **It Would Have Terminated Plaintiffs Even In The Absence Of Any**
 15 **Alleged Protected Activity.**

16 Boeing presented the affidavits of the individuals who made the decision to terminate
 17 Mr. Tides and Mr. Neumann for creating unacceptable liability to The Boeing Company,
 18 aggravated by the fact that their actions had an adverse impact on The Boeing Company's
 19 reputation and relationships. Exhibit G to Motion.⁴ That evidence demonstrated by clear and
 20 convincing evidence that each of the decision makers would have made the same decision
 21

22 *Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Finally, the case cited in the letter is not a Sarbanes-Oxley case,
 23 and is therefore inapt.
 24

1 regardless of any alleged protected activity. Plaintiffs instead merely conclude, without an iota
 2 of supporting evidence, that “there is an issue of fact whether any part of Boeing’s motivation
 3 for the termination included retaliation for protected activity.” Unlike in *Alice in Wonderland*,
 4 simply saying something is so does not make it so. In order to rebut a party’s motion for
 5 summary judgment, the non-moving party must point to specific facts supported by the record,
 6 which demonstrate a genuine issue of material fact. *Reese v. Jefferson Sch. Dist. No. 14J*, 208
 7 F.3d 736, 738 (9th Cir. 2000). Such specific facts, however, may not come from mere
 8 “allegations or denials in its own pleading.” Fed. R. Civ. P. 56(e)(2). Conclusory allegations
 9 in legal memoranda are not evidence, and cannot by themselves create a genuine issue of
 10 material fact where none would otherwise exist. *See Project Release v. Prevost*, 722 F.2d
 11 960, 969 (2nd Cir. 1983); *accord Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988)
 12 (“Sweeping conclusory allegations will not suffice to prevent summary judgment.”)
 13
 14

15 Because Plaintiffs have failed to meaningfully contest Boeing’s proof that it would
 16 have terminated Plaintiffs’ employment regardless of their alleged protected activity, let alone
 17 present evidence to the contrary, the Court should grant summary judgment and dismiss these
 18 claims.
 19

20 IV. CONCLUSION

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 23 ⁴ Plaintiffs inaccurately state that the presumed punishment for their misconduct was “verbal warning.” As
 24 demonstrated by Plaintiffs’ Exhibit 5, the presumed punishment, before aggravating circumstances are
 considered is “time off work.” Plaintiffs’ Exhibit 5, p.15.

1 Plaintiffs have failed to come forward with admissible evidence that they engaged in
 2 any protected activity, that they were subjected to any adverse employment action other than
 3 termination, or that their alleged protected activity was a contributing factor to their
 4 termination. In addition, Boeing has proven by clear and convincing evidence, unrebutted by
 5 Plaintiffs, that it would have terminated Plaintiffs' employment regardless of any alleged
 6 protected activity. For these reasons, the Court should grant Boeing's motion for summary
 7 judgment and dismiss this case.
 8

9
 10 Respectfully submitted, this 18th Day of December, 2009.

11 Defendant The Boeing Company
 12

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2009, I electronically filed the foregoing Motion for Summary Judgment with the Clerk of the Court via the CM/ECF System which will send notification of such filing to counsel as follows:

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